BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JEAN E. HEAVEY Claimant	)	
v.	)	Docket No. 1,070,266
VIA CHRISTI HEALTH, INC. Self-Insured Respondent	)	

ORDER

Claimant requests review of the September 26, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Rebecca Sanders. Claimant appears by counsel, Roger D. Fincher of Topeka, Kansas. Self-insured respondent appears by counsel, Kim Poirier of Overland Park, Kansas.

ISSUES

The ALJ found claimant failed to sustain her burden of proving appropriate notice of accident was provided to respondent within 20 days; therefore, claimant's preliminary hearing requests were denied.

Claimant argues she is entitled to medical treatment as her date of accident was a series from January 27, 2014, through March 20, 2014, her series of accidents arose out of and in the course of her employment with respondent, and respondent had actual knowledge of claimant's injury, relieving her from formal notice requirement.[1]

Respondent argues the ALJ's Order should be affirmed as claimant suffered an acute injury on January 27, 2014. Further, respondent contends there is no evidence claimant suffered a repetitive trauma injury, and claimant failed to give timely notice.

The issues raised for the Board's review are:

1. Was claimant injured in a single day accident or a series of accidents?

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[1] Claimant initially reported her injury as an acute accident dated January 27, 2014, before amending the claim to a repetitive use trauma occurring January 27, 2014, through March 20, 2014.

2. Did claimant's injuries arise out of and in the course of her employment?

3. Is claimant entitled to medical treatment?

4. Did claimant give respondent notice of her personal injury by accident in compliance with K.S.A. 2013 Supp. 44-520?

FINDINGS OF FACT

Claimant was employed at Mercy Regional Health Center in Manhattan, Kansas (respondent), for 27 years as a registered nurse. Claimant worked in the women's health department and was assigned to labor and delivery and postpartum care. Claimant was occasionally assigned as the charge nurse, the person responsible for assignments, scheduling procedures, answering questions, and generally any other issues that may arise in the unit.

On January 27, 2014, while working as the charge nurse during the evening shift from 6:00 p.m. to 6:00 a.m., claimant testified she pulled her left arm and injured her left shoulder while moving a patient in a hospital bed. Claimant testified she did not feel the need to report the accident because she did not think she had a significant injury at the time. Claimant indicated the staff gets bumped and bruised regularly at work. Claimant stated she had no treatment for left shoulder pain prior to January 27, 2014.

Respondent's workers compensation policy, dated March 2010, stated employees must report an injury within 10 days of the occurrence. Sandy Werneke, a registered nurse and the employee health nurse at respondent, indicated the policy had not been updated to a 20-day reporting period since the change in workers compensation law in 2011. Ms. Werneke testified the copy of the policy provided to claimant did not contain the 20-day reporting period.

Ms. Werneke testified new employees were educated on how to file workers compensation claims at orientation, and she also posted workers compensation guidelines on her office door. If an employee was injured during the evening shift, the employee would report the event to the charge nurse on duty. The charge nurse would then report the injury to both the house supervisor and Ms. Werneke the following day. Because she thought the pain would resolve, claimant did not immediately report the injury to her supervisor, Kimberly Cox, or Ms. Werneke. Claimant also testified she believed the reporting period was 10 days, and as her pain began to worsen after the 10-day period, she did not report the injury. Claimant had previously filed a claim with respondent and received treatment for a low back injury.

Claimant continued working after January 27, 2014. She testified her condition worsened and she experienced decreased range of motion and increased pain in her left

shoulder. Claimant reported her left shoulder injury to Ms. Werneke on February 20, 2014. Claimant originally believed the injury occurred on January 9, 2014, but realized the injury date was January 27, 2014, when she reviewed the logbooks. Claimant testified:

> Q. Okay. So as you sit here today under oath, do you know for certain if you – if you hurt your shoulder at work that moment in time on January 9th or January 27th?
>
> A. Yes. I know it was the 27th.
>
> Q. Okay. And tell me one more time how you know that for certain based on all the paperwork and the dates that you've alleged?
>
> A. The 27th is when I had a C-section and moved a bed. On the 9th there wasn't a C-section moving a bed.[2]

On February 22, 2014, claimant completed respondent's DOERS report, which is a workers compensation injury report. Claimant agreed the DOERS system was accessible to all employees, though she did not know how to access the report until she asked Ms. Werneke. Claimant noted an accident date of January 9, 2014, on her DOERS report.[3] Ms. Cox testified if a DOERS report was not completed, respondent's notification requirement was not satisfied, even if the employee informed the charge nurse.

Ms. Werneke referred claimant to Dr. Rahila T. Andrews, a physician at respondent's workers compensation clinic, for treatment. On February 24, 2014, claimant complained to Dr. Andrews of left shoulder pain and noted the onset occurred seven weeks prior. After taking x-rays and performing a physical examination, Dr. Andrews diagnosed claimant with left shoulder pain and recommended physical therapy. Dr. Andrews recommended further assessment of the left rotator cuff, including a possible MRI, if claimant's condition did not improve.

Claimant testified her claim was denied in a letter dated March 5, 2014, as the claim was filed four days after the deadline. After the claim was denied, Ms. Werneke provided claimant with a current copy of respondent's workers compensation policy and mentioned the new 20-day reporting period was not yet on the copy. Claimant could no longer treat with Dr. Andrews and instead treated with her family physician.

On March 20, 2014, claimant was required to renew her CPR certification in order to remain employed. Claimant testified she experienced increased pain after performing chest compressions during the certification. Claimant did not complete a DOERS report for the March 20, 2014, shoulder pain. Claimant indicated she was told by both Ms.

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[2] P.H. Trans. at 42.

[3] See *Id.*, Resp. Ex. C at 1.

Werneke and respondent's human resources department that another shoulder injury would be considered preexisting, and not compensable. Claimant testified her pain was worse on March 20, 2014, than on January 27, 2014.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2013 Supp. 44-520 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the

content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

K.S.A. 2013 Supp. 44-508(d) states:

"Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2013 Supp. 44-508(e) states:

"Repetitive trauma'' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury.

"Repetitive trauma'' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is workrelated; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

K.S.A. 2013 Supp. 44-508(f) states:

(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

> (i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;
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> (ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and
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> (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
>
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

> (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
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> (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
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> (iii) accident or injury which arose out of a risk personal to the worker; or

> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.
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> (B) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.
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> (C) The words, "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

ANALYSIS

In deciding whether notice was timely made, the ALJ first determined if claimant suffered an injury by accident or repetitive trauma. The ALJ concluded claimant suffered an injury by accident while moving a patient in a hospital bed on January 27, 2014. The undersigned agrees. An injury by repetitive trauma can only be proven with the support of diagnostic or clinical tests. The ALJ was correct in stating there are no clinical or diagnostic tests contained in the record showing claimant suffered an injury by repetitive trauma. The medical evidence entered into the record is insufficient to meet the burden of proving an injury by repetitive trauma.

[4] K.S.A. 44-534a.

With the absence of evidence of an injury by repetitive trauma, the undersigned agrees with the ALJ that the record shows claimant suffered a single traumatic injury on January 27, 2014. The ALJ found claimant did not provide notice of an injury until February 20, 2014. Claimant disagrees and alleges she reported the January 27, 2014 injury to herself on that date. The ALJ found notice from claimant to herself to be insufficient, even if claimant was a supervisor. The undersigned agrees. A supervisor's knowledge of her own injury was not imputed to her employer.[5] The Court of Appeals, in *Wietharn*, wrote:

> If an authorized agent had knowledge of his own injury but did not forward such knowledge to the employer, then the purpose of the statute would be defeated and the result would effectively be strict liability on behalf of the employer. Since the legislature intended employers to have an opportunity to investigate reports of accidents, such a result would not be consistent with legislative intent. The claimant/authorized agent clearly has a conflict of interest and could innocently worsen his or her condition by not seeking proper medical care promptly or could actually deceive the employer.[6]

Claimant argues respondent had actual notice of the January 27, 2014, injury, which relieved her of the burden to prove any type of formal notice. Claimant testified she had a conversation with Ms. Werneke that a CPR certification test made claimant's shoulder hurt. In her brief, claimant states Ms. Werneke asked how claimant's shoulder was feeling and indicated she knew of claimant's shoulder injury. Even had this conversation taken place, claimant testified the CPR certification occurred on March 20, 2014, after respondent had already received formal notice. There is no persuasive evidence respondent had actual notice of an injury prior to February 20, 2014.

CONCLUSIONS

Claimant suffered an injury by accident arising out of her employment with respondent on January 27, 2014. Claimant failed to provide notice of her injury within 20 days as required by K.S.A. 2013 Supp. 44-520. All other issues are moot.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated September 26, 2014, is affirmed.

IT IS SO ORDERED.

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[5] See *Wietharn v. Safeway Stores, Inc.,* 16 Kan. App. 2d 188, 820 P.2d 719 (1991).

[6] *Id* at 192.

Dated this _____ day of December, 2014.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

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